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No. 160

IN THE

Supreme Court of the United States

OCTOBER TERM 1964

HARRY R. SMITH,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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The major purpose of this reply is to bring to the attention of the Court the decision of the Court of Appeals for the District of Columbia in *Fletcher* v. *United States*, 332 F. 2d 724, decided April 30, 1964, and published in the advanced sheets on August 10, 1964, long after the Petition for the Writ was filed in this Court. It is respectfully submitted that this decision presents a conflict of decision

between that Circuit and the decision of the 8th Circuit and the case at bar, and presents an additional reason for the grant of Certiorari. We indicated in this Court, and in the Court of Appeals for the Eighth Circuit, that our interpretation of this Court's decision in *Namet* v. *United States*, 373 U.S. 179, was that invocation of the Fifth Amendment by a government witness, while not necessarily prejudicial, must be diligently considered to determine whether the prejudice and peril to a defendant is outweighed by the minimal benefit to the interests of justice. It was our further contention that the interest of justice was not served in this case; that the only result of the government inducement and presentation as evidence of the invocation of the Fifth Amendment was a necessarily adverse consequence to the defendant. The Court of Appeals for the Eighth Circuit, though *Namet* constituted almost the entire argument of this Petitioner, on appeal never adverted to that case in its decision. On the other hand, the Court of Appeals for the District of Columbia, in *Fletcher*, showed a conscientious effort to relate the circumstances in the *Fletcher* case to the guides and sign posts indicating the standard of prejudice or permissibility laid down in *Namet*. Using such guide posts, the Court of Appeals for the District of Columbia reversed the conviction in *Fletcher*. The circumstances in *Fletcher* are, with one exception, identical with the circumstances in this case. The Court of Appeals for the District of Columbia held as follows:

> "Among the circumstances of the case at bar are the following features: (1) The Government knew, and the court also knew, that Anderson would refuse to testify upon his claim of the privilege under the Fifth Amendment. (2) The prosecutor asked a series of questions, which depicted the alleged offense in its entirety. The questions were not a 'few lapses' as

referred to in Namet. (3) The testimony sought from Anderson was the principal source of support for the testimony of the Government's only witness, the cab driver, and thus, if the jury drew inferences from Anderson's refusal to answer, those inferences would have served that purpose. (4) Anderson's refusals to testify were not incidents in the course of other admissible testimony given by him. He gave no other testimony. Save for the formalities, such as name, age and address, his refusals constituted the whole of his participation in the case. (5) Anderson's refusals were not mere incidents in a long trial. The trial was a short one, actually occupying some six hours spread over parts of two days, and Anderson's part in it was a major feature of the proceeding. (6) Although the court instructed the jurors that they should draw no inferences of guilt from Anderson's refusals, it added that the exercise by Anderson of his constitutional right 'does not mean by itself, of course, that this defendant is guilty.' The jurors might well have understood that statement to mean that Anderson's refusals might be considered along with other evidence as proof of Fletcher's guilt.

"The opinion of the Court in the *Namet* case makes clear that the features we have enumerated are critical in the problem before us." *Fletcher* v. *United States*, 332 F. 2d 724, 726.

All considerations present in *Fletcher* were equally present here, save the last one, (6), and in the interest of comparison we will set forth hereinafter the instruction given by the trial court to the jury in this cause.

"The witness Frank Anthony Dalia after having given some testimony made claim to the constitutional right against self-incrimination, which claim was sustained by the Court. The fact that said witness made said claim and that said claim was sustained by the Court is not to be given any weight or consideration by you arriving at your verdict." (App. 19-20)

We submit that five features out of six do not make this problem less critical than it was in *Fletcher*, and submit that there is a conflict in Circuits between the Eighth in this case, and the Court of Appeals for the District of Columbia in *Fletcher* v. *United States*, 332 F. 2d 724.

It is recognized that the Government made no more than fleeting reference to point two, and none at all to point four of the reasons we urge upon this Court for granting the Writ of Certiorari. What references it did make to the eliciting of the admission of a plea of guilty by the co-defendant, Dalia, have no relation to the case at bar. In opposition to issuance of the Writ for this reason, the Government, without further comment, merely cites, *Casados* v. *United States*, 300 F. 2d 845, and *United States* v. *Crosby*, 294 F. 2d 928. In *Casados* the objection to eliciting the testimony admitting the entry of a plea of guilty was raised on appeal for the first time. In *United States* v. *Crosby*, 294 F.2d 928, the plea was entered outside of the presence of the jury and the jury was not informed of the entry of the plea. It is difficult to see how the Government can assert these as established authority for the conduct in this cause. As to the fourth reason we advance to this Court, and also the fourth issue presented, the Government has not addressed itself at all.

We recognize it is contrary to the rules of this Court for a reply to contain matter that is readily ascertainable by the reviewing authority. However, in reciting the fact statement of the case, the petitioner used, as a form, the facts found to have been established by the Court of Appeals for the Eighth Circuit, supplementing some, chang-

ing nothing. The same cannot be said of the Government. A few of the more obvious instances of misstatement follow:

On Page 5 of the Government's Brief, the Government states that the petitioner did not object when the United States Attorney said that Dalia would be called as a Court's witness. On the contrary, when the Government requested that Dalia be called as a Court's witness for the purpose of cross-examination, counsel for petitioner immediately said "I would like to take up a matter outside the presence of the jury", and, upon the jury retiring, immediately stated his objection (Tr. 234-235).

It is absolutely impossible to reconcile the fact statement of the Government in two instances, which we will set forth without argument. At page 9 of the Government's Brief it states:

> "That Dalia had pleaded guilty was brought out early in the examination before it was clear that he would insist on claiming the privilege."

And yet at page 4, the Government admits he invoked the privilege on the second question, as follows:

> "After the jury returned, the government began its examination of Dalia, which may be summarized as follows: (1) after Dalia gave his name, he responded to the second question—whether he was also known as Anthony Walters—by invoking the Fifth Amendment; . . ."

The second instance is to be found at page 6 of the Government's Brief, where it is argued:

> "No mention was made during the examination that Dalia's Indiana sentence ran concurrently with his sentence for entering the bank in Altoona."

Immediately thereafter at page 7 of the Government's Brief it states:

> "When the jury entered, the Court ordered Dalia—despite his repeated protests that his 'rights' were being violated—to take the witness stand. Petitioner's counsel, resuming cross-examination, asked the witness six questions: * * * and (6) whether, in view of his plea of guilty, he had been sentenced concurrently for the Altoona bank theft."

CONCLUSION.

We respectfully submit to the Court that this case does represent and involve important questions in the administration of federal law which should be settled by this Court, and the conduct of this case sanctions such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. For the foregoing reasons, we submit this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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